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No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, Trustee of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR THE PETITIONER

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REPLY FOR THE PETITIONER

Respondents freely admit here, just as they did below, that this case squarely presents and perfectly illustrates the entrenched circuit conflict over whether non-named class members may appeal a class action settlement. BIO 8 & nn.4-5. Respondents furthermore do not dispute that the decision below cannot be reconciled with this Court's precedents holding (i) that the Fourteenth Amendment's Due Process Clause protects a class member's right to appeal (see Pet. 19-22), and (ii) that so-called "quasi parties" in petitioner's position have standing to appeal (*id.* 16-19). Indeed, respondents do not dispute for a moment that the majority rule in the circuits that the Fourth Circuit adopted in this case simply makes no sense on its own terms: petitioner is a member of the certified class in this case and thus plainly *is* a "party" to this litigation, as evidenced by the fact that the

district court entered an injunction against him on the basis of the settlement; petitioner thus plainly has the right to appeal. See *id.* 18-19.

Having thereby conceded the essential elements of this Court's certiorari inquiry, respondents are reduced to arguing that any ruling by this Court would be "advisory" (BIO 11-13) and that the question presented is not sufficiently important to warrant this Court's attention (*id.* 13-18). Neither argument is persuasive.

I. Petitioner Is Not Seeking An "Advisory" Opinion.

This petition presents a live case or controversy meriting review in this Court because the Fourth Circuit held that petitioner lacked standing to appeal "[a]s a threshold matter" (Pet. App. A14) and avowedly left the merits of the case unresolved. Respondents' argument that footnote seventeen of the panel majority's opinion effectively decided the merits is facially absurd. That footnote could not be clearer: "*we do not decide this issue*." Pet. App. A24 n.17 (emphasis added).

Respondents nonetheless contend that they are confident they will prevail on remand. Their bravado, however, falls far short of rendering this Court's ruling on the question presented by this petition "advisory." If this Court grants petitioner the relief he seeks – a holding that he has standing to appeal – the case will be remanded for disposition on the merits. The fact that the court of appeals might later rule for respondents is immaterial. Cf. Order of Nov. 8, 2001, No. 01-408, *Holmes Group, Inc.* v. *Vornado Air Circulation Sys.*, *cert. granted* Nov. 8, 2001 (granting certiorari to consider whether jurisdiction properly rested with Federal Circuit or instead regional circuit, notwithstanding that Federal Circuit panel's reasoning on the merits of the case would presumably be adopted by the regional circuit on remand if the petitioner prevailed).

Respondents' confidence that they will win on remand is, moreover, entirely misplaced, for their statement that footnote seventeen "address[ed] in some detail each of Devlin's objections to the settlement" (BIO 12) is, once again, a flat misstatement of what the court did. As that footnote explains in its very first sentence, the panel majority avowedly discussed only "*one* of the bases for Devlin's challenge to the class settlement" – *viz.*, "that COLA benefits are accrued benefits that could not be eliminated by amendment without prior notice to and approval from the Secretary of Labor." Pet. App. A24 n.17 (emphasis added). The majority did not so much as mention, for example, petitioner's argument that the settlement was unfair because it did not require active employees to make pension contributions that retirees had made for many years. See Pet. 5. And although respondents make much of the fact that the concurring judge in this case concluded that the district court "was well within its discretion" in approving the settlement as fair (BIO 11 (citing Pet. App. A35)), the much more salient point is that the *majority* did not address the settlement's fairness.

Even as to the one argument addressed by the panel majority – regarding which, as noted, it took care to make clear "we do not decide" (Pet. App. A24 n.17) – the court acknowledged that the correct rule of law "is at best unclear." *Id.* Respondents themselves concede that the law is totally unsettled: "What benefits fall within this tautological definition and are therefore protected by section 204(g)'s anticutback rule has been the subject of much litigation that has produced no clear answer." BIO 3 n.1. It is also noteworthy that the Scardelletti respondents (*i.e.*, the plaintiff-trustees) originally took *petitioner's* position in the district court, arguing that "the benefits granted by the COLA amendment were 'accrued' benefits that could not be reduced by a voluntary plan amendment." *Id.* 2.

The Fourth Circuit's passing dictum casting doubt on this one aspect of petitioner's appeal, moreover, will benefit from

further consideration on remand. The majority below suggested that, even if ERISA prohibited a pension plan from making the plan amendment in this case, a district court might still be able to approve the same amendment: "In other words, it was not a Plan amendment that revoked the COLA increases, but rather the district court's final order declaring the 1991 Amendment void." Pet. App. A24 n.17. But that reasoning would make the relevant ERISA provision a nullity, for it would always permit plan administrators (as in this case) to secure declaratory judgments from federal district courts permitting them to enact otherwise unlawful plan amendments. Congress could not have intended that result.

The decisions cited by respondents (BIO 11) for the proposition that this petition seeks an advisory ruling are accordingly entirely dissimilar from this case, which is presumably why the brief in opposition lifts quotes from them out of context without any further explanation. In truth, respondents seem to have taken these citations largely from page 172 of the *Stern & Gressman* treatise, where they are properly cited for propositions that have nothing to do with this case. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.4, at 172 (7th ed. 1993) (citing *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 (1955), for the proposition that, "[i]f the statute upon which the controversy rests has expired or been amended in a manner which will prevent the problem from arising in the future, certiorari may be denied despite a square conflict"); *id.* (citing *The Monrosa* v. *Carbon Black Export*, 359 U.S. 180, 184 (1959), for the proposition that "[i]f it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon

which there is conflict, the conflict itself may not be sufficient reason for granting review").[1]

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[1] Thus, the Court DIG'ed *Rice* v. *Sioux City Memorial Park Cemetery* because an intervening state statute "bar[red] the ultimate question presented in this case from arising again in that State," such that the Court concluded that the case did not satisfy its rule that certiorari was appropriate "where a state court has decided a federal question of substance not theretofore determined by this court." 349 U.S. 70, 73 (1955). "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* at 74. *Rice* thus stands for the proposition, inapposite here, that certiorari is inappropriate where the Court's decision "would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 269 (1962) (per curiam).

The Court DIG'ed *The Monrosa* v. *Carbon Black Export* because it concluded after briefing and argument that the particular contract before it did not implicate the circuit conflict asserted by the petition for certiorari: "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly." 359 U.S. 180, 184 (1959). *The Monrosa* is accordingly regularly cited for the proposition, inapposite here, that "[n]ow that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered, we have concluded that the writ should be dismissed as improvidently granted." *Belcher* v. *Stengel*, 429 U.S. 118, 119-20 (1976) (per curiam).

Finally, the Court DIG'ed *Ticor Title Insurance Co.* v. *Brown*, in part because "[o]n the day we granted certiorari we were informed that the parties had reached a settlement designed to moot the petition, which now awaits the approval of the District Court," which led the Court to conclude that "as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants." 511 U.S. 117, 122 (1994) (per curiam). This case does not implicate *Ticor*'s holding.

Respondents' remaining contention – that this Court's consideration of this case would "delay [the retirees'] receipt of the benefits of the settlement" (BIO 6 n.13) – is, to be blunt, outrageous. The settlement restores a portion of the retirees' COLA benefits that the trustees revoked in violation of ERISA. Most relevant here, it was *respondents* – *i.e.*, the plaintiff-trustees and the defendant class representatives whom they hand-picked – who designed the terms of the settlement, including a provision mandating that if even a single retiree appealed, no class member would receive any benefits until that appeal was totally concluded. (As the petition explained (at 20 n.7), the plaintiffs have conveniently been paying all the attorney's fees of the class representatives throughout the case.) The only function of this provision is to strong-arm class members into abandoning their objections. Indeed, petitioner purposefully filed his petition for certiorari well before the statutory deadline and requested in writing that respondents revise the settlement to disburse some benefits to retirees while his appeal is pending; respondents categorically refused. It is hard to imagine a better illustration of why it is essential that this Court address the question presented and hold that settlements do not extinguish objectors' right to appeal.

II. The Question Presented Is Vitally Important.

As an alternative ground for denying certiorari, respondents suggest that the question presented is not important enough to warrant this Court's attention. Objectively, that is not correct. As the petition explained, this Court recently granted certiorari to decide the very similar question whether objectors to a derivative-action settlement have standing to appeal. *Felzen* v. *Andreas*, 134 F.3d 873 (CA7), *cert. granted*, 524 U.S. 980 (1998), *aff'd by equally divided Court*, 525 U.S. 315 (1999). For two reasons, the grounds for granting certiorari are even more substantial here: (i) the circuit conflict in *Felzen* was substantially narrower

(only two-to-one); and (ii) the conflict presented here arises in all class actions, not merely derivative suits. See Pet. 12.

Of note, respondents do not dispute that the question whether an objecting class member has the ability to appeal is vitally important. The appellant's right to due process is at stake. So, too, is the proper disposition of innumerable class actions. As the petition explained, class action settlements are frequently collusive and approved by district judges upon only brief consideration. See Pet. 24-25. The prospect of an appeal puts greater pressure on the litigants and the district judge to enter into a lawful and equitable settlement. It was an objector's appeal that led to this Court's seminal decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). See also, *e.g.*, *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 715, 722-23 (CA7 2001) (reversing denial of post-settlement motions to intervene and partially reversing order approving settlement); *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (CA7 2000) (reversing denial of post-certification motion to intervene and then reversing approval of settlement); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 778-79 (CA3) (appeal by objecting class members leads to rejection of settlement as unfair and inadequate), *cert. denied*, 516 U.S. 824 (1995).

Although respondents' argument is not entirely clear, it seems to be that the circuit conflict over objectors' right to appeal makes no practical difference because objectors always can intervene in the case and appeal on that basis. But respondents just ignore the myriad reasons – all set forth in the petition and summarized once again here – why that is not true:

- Class members do not have an automatic right to intervene. Intervention will be denied if they do not satisfy the requirements of Fed. R. Civ. P. 24(a) – in particular, the requirement that the class representatives are not adequately representing their interests.

- Intervention is costly and burdensome for the class member. The objector not only must file a complaint or answer in intervention, but also is then subject to all the ongoing requirements of a litigating party, including discovery.
- Requiring intervention is directly contrary to the point of class action litigation. On the view of the respondents and the Fourth Circuit, every class member who suspects that he *might* be disadvantaged by a settlement that *might* occur in the case must promptly intervene. By contrast, the goal of class action litigation – notably, a goal that the panel majority erroneously thought it was furthering – is to avoid having numerous class members in the case who can "usurp the role of the class representative" (Pet. App. A21).
- Requiring intervention undermines sound judicial administration. The District Courts will be burdened by requests to intervene. When they understandably deny those requests, the putative intervenor will immediately appeal as of right.

Respondents' specific reliance on the Seventh Circuit's appealability rule (BIO 15-16) is simply befuddling. As the petition explained (at 13) and respondents do not seem to contest, the rule in the Seventh Circuit is that a class action objector has an effectively *per se* right to intervene, even after the settlement is consummated, in order to preserve his right to appeal as a formal "party." *In re Synthroid Mktg. Litig.*, 264 F.3d at 715; *Crawford*, 201 F.3d at 880-81. In petitioner's view, that approach places a totally unnecessary burden on the district judge. But the relevant point here is that the Fourth Circuit *rejected* the Seventh Circuit's approach – it held that petitioner could not appeal notwithstanding that he had sought to intervene well before the district court approved the settlement. Of particular note, the Seventh Circuit adopted its incredibly permissive

approach to intervention precisely *because* objectors' right to appeal would otherwise be denied – *i.e.*, the Seventh Circuit's decisions flatly refute respondents' claim that this circuit conflict makes no difference. *Crawford*, 201 F.3d at 881 ("Because only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision.").

Finally, respondents at points attempt to cast aspersions on the manner in which petitioner litigated this case in the district court. The point of these asides is unclear – they do not suggest, and respondents do not contend, that this is an inappropriate vehicle to resolve the question presented. Moreover, respondents' claims are simply false. The class counsel consistently withheld information from petitioner. See, *e.g.*, C.A. App. 526 (Apr. 7, 1999 letter from petitioner to class counsel: "Dear Ms. Kraft: On at least four (4) separate occasions I have requested that you furnish the terms of the settlement of the action brought against the former Plan trustees, to no avail."), 528 (Apr. 7, 1999 letter from petitioner to class counsel: "You have also failed to furnish the terms of the settlement of the action brought against the former trustees and I request you end the secrecy that has been placed on all these matters and furnish the information requested."). Respondents' statement that they provided "periodic reports on the status of negotiations and the terms under discussion" (BIO 5) is just a euphemism for the fact that they said they were negotiating the abrogation of the COLA but, as the just-quoted letters explain, would not provide petitioner with the details. Petitioner also did not object "to any idea of settlement" (*id.*); there is no support for any such proposition in the cited pages of the appellate record (C.A. App. 525-35). His position was, and is, that ERISA prohibited abrogating the COLA for retirees, and that any settlement would accordingly have to treat the retirees

equitably.[2] And while it certainly is the case that petitioner did not formally move to intervene until the settlement was finalized and he received a copy, there is no reason in law or logic to hold that he had to act earlier in order to preserve his right to appeal the settlement. Not only would it have been impractical to object to the settlement earlier, it would have been *impossible*.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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[2] Respondents' further suggestion that petitioner stands almost alone in objecting to the settlement (see BIO 6) is also false. Petitioner objected on his own behalf and also (as a representative of an association of retirees) on behalf of more than *half* of the retirees. See Pet. 4.